18-397-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

STUART FORCE, individually and as Administrator on behalf of the Estate of TAYLOR FORCE, ROBBI FORCE, KRISTIN ANN FORCE, ABRAHAM RON FRAENKEL, individually and as Administrator on behalf of the Estate of YAAKOV NAFTALI FRAENKEL, and as the natural and legal guardian of minor plaintiffs A.H.H.F, A.L.F, N.E.F, N.S.F, and S.R.F, A.H.H.F, A.L.F., N.E.F., N.S.F., S.R.F., RACHEL DEVORA SPRECHER FRAENKEL, individually and as Administrator on behalf of the Estate of YAAKOV NAFTALI FRAENKEL and as the natural and legal guardian of minor plaintiffs A.H.H.F, A.L.F, N.E.F, N.S.F, and S.R.F, TZVI AMITAY FRAENKEL, SHMUEL ELIMELECH BRAUN, individually and as Administrator on behalf of the Estate of CHAYA ZISSEL BRAUN, CHANA BRAUN, individually and as Administrator on behalf of the Estate of CHAYA ZISSEL BRAUN, SHIMSHON SAM HALPERIN, SARA HALPERIN, MURRAY BRAUN, ESTHER BRAUN, MICAH LAKIN AVNI, individually, and as Joint Administrator on behalf of the

(Caption Continued on the Reverse)

On Appeal from the United States District Court
for the Eastern District of New York

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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Estate of RICHARD LAKIN, MAYA LAKIN, individually, and as Joint Administrator on behalf of the Estate of RICHARD LAKIN, MENACHEM MENDEL RIVKIN, individually, and as the natural and legal guardian of minor plaintiffs S.S.R., M.M.R., R.M.R., S.Z.R., BRACHA RIVKIN, individually, and as the natural and legal guardian of minor plaintiffs S.S.R., M.M.R., R.M.R., and S.Z.R., S.S.R., M.M.R., R.M.R., S.Z.R.,

Plaintiffs-Appellants,

v.

FACEBOOK, INC.,

Defendant-Appellee.

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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

SUMMARY OF ARGUMENT

The Communications Decency Act ("CDA") does not apply extraterritorially. Because *all* significant contacts in this case are overseas, the CDA has no role here. Facebook has no response and instead attempts to force the Court to step two of the extraterritoriality inquiry by improperly looking to the focus of just 47 U.S.C. 230, rather than the entire CDA. The focus of the CDA, as Facebook acknowledges, is objectionable and offensive material on the Internet. Neither §230 nor subsection 230(c)(1) have a different focus. Moreover, §230(c)(1) has been raised prematurely. As Facebook acknowledges, it may be considered at this stage only if the complaint makes its application inevitable. Yet Facebook did nothing to meet the burden of showing the inevitability of §230. Finally, because the CDA is a substantive federal statute, it cannot apply against plaintiffs' non-federal claims. Facebook admits that Israeli law controls those claims. They thus cannot be defeated by a federal substantive defense.

The complaint plausibly alleges that Facebook was a substantial factor in plaintiffs' injuries (Facebook does not argue otherwise) and that Facebook had actual and constructive knowledge of its material support of Hamas. It also plausibly alleges that Facebook provided Hamas with substantial assistance and knowingly

worked to Hamas' benefit (and its own), knowing that Hamas was a designated terrorist organization, hell-bent on killing people. Nothing more is required.

Neither the First Amendment nor the CDA support Facebook. The First Amendment is not even properly before this Court and no one's First Amendment rights are implicated by this litigation. Even so, *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010), establishes that Congress may enact even content-based restrictions on speech in its effort to combat terrorism. The restriction here is content-neutral and poses no problem at all. The CDA is likewise irrelevant. Facebook is a developer of content and has failed to credibly argue otherwise. And the Anti-Terrorism Act ("ATA") imposes no duties on Facebook that derive from its status as publisher. It imposes a duty not to materially support Hamas, prohibiting Facebook from providing any services to Hamas, regardless of the content or form of those services. The preconditions for CDA immunity are thus clearly not met.

ARGUMENT

I. Section 230 May Not be Considered

A. Section 230 Does Not Apply Overseas

1. This is an "easy [extraterritoriality] case." (Opening 28-30[*]). Neither the full CDA (SPA65-71) nor §230 gives "clear indication of...extraterritorial application." *Morrison v. Nat'l Australia Bank*, 561 U.S. 247, 255 (2010). It thus has none. *Id.*; *RJR Nabisco v. European Community*, 136 S.Ct. 2090, 2101 (2016); *Licci v. Lebanese Canadian Bank*, 834 F.3d 201, 214-15 (2d Cir. 2016); (Opening 28-30). Facebook presents no response.

The Court's inquiry should end here.

2. Facebook improperly jumps to step two, despite never showing that the second step applies, and gets step two wrong. As plaintiffs explained, again without response from Facebook, step two inquires on the focus of an *entire enactment*, not just a phrase of particular interest. (Opening 30-31) (citing, *inter alia*, the Supreme Court's most recent opinion on the subject, *WesternGeco v. ION Geophysical*, 138 S.Ct. 2129, 2137 (2018)).

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[*] Parenthetical page citations reference the Joint Appendix. Notations within parenthetical citations have these meanings:

Opening	Plaintiffs' opening brief
Response	Facebook's response brief
SPA	The Special Appendix appended to the opening brief
EFF	Movant Electronic Frontier Foundation's proposed amicus brief

"[T]he object of [the CDA's] solicitude" is objectionable and offensive material on the Internet. (Opening 17-21 & 30-32). The CDA aims to clean up the Internet by facilitating removal of objectionable material, in part by facilitating user-directed blocking and filtering. Section 230, enacted under the title "Online Family Empowerment" (SPA69), implements that objective by removing the threat of liability for editing third-party content, a significant obstacle to such private editing. (Opening 17-21 & 31-32).

Facebook ignores the CDA's text (aside from a few cherry-picked sentences) and conjures from the legislative Conference Report evidence that the CDA's purpose is to protect a "robust medium for Internet communication." (Response 27-28). But the Conference Report refutes Facebook. (Opening 18-19 & 31-32). Briefly, it describes what became §230 as "provid[ing] 'Good Samaritan' protections from civil liability for providers or users of an interactive computer service for *actions to restrict or to enable restriction of access to objectionable online material*." H.R.Rep. 104-458 at 194 (1996) (Conf. Rep.) (emphasis added). Regarding the *Prodigy* decision, it says: "The conferees believe that such decisions create serious obstacles to *the important federal policy of empowering parents to determine the content of communications their children receive* through interactive computer services." *Id.* (emphasis added). Thus, Congress understood the focus of §230 to be objectionable material on the Internet that the CDA was designed to clean up.

3. Facebook improperly seeks the focus of §230 alone, as if it were enacted independently and meant to operate in a vacuum. Citing no authority, Facebook concludes that the "text of §230 itself" reveals a focus of "limiting civil liability." (Response 27-30).

Some provisions within §230 mention liability. For example, §230(c)(2) does, but it is inapplicable here. Perhaps some sentences within §230(a) & (b) can also be read (in a vacuum) to suggest a civil liability focus. But much else within §230 cannot be so read. For example, §230(b)(4) addresses "remov[ing] disincentives for the development and utilization of blocking and filtering technologies," §230(b)(5) addresses "vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and [digital] harassment," and §230(d) obligates Internet providers to inform customers of the availability of blocking and filtering technologies. Nothing there suggests a focus of limiting civil liability. Facebook's blinkered conclusion that §230 focuses on liability limitation derives only from the few cherry-picked subparagraphs it likes.

All of §230 does not actually interest Facebook. Its true interest lies in §230(c)(1), which does not even mention "liability" and says only that certain internet providers cannot be "treated as the publisher or speaker of any information provided by [certain third parties]." §230(c)(1). That is an odd means of executing a desire to limit liability, particularly in context of the remainder of the CDA.

Congress mentioned "liability" in §230(c)(2) but not §230(c)(1), strongly suggesting that regulating liability is *not* the focus of §230(c)(1).

Had Congress intended §230(c)(1) to limit liability, it would have said so. Plaintiffs surveyed the civil statutes in Titles 18 and 47 (where the ATA and §230 are codified, respectively) and identified 65 instances (quoted in the Addendum) where Congress *expressly* limited civil liability. One such example is §230(c)(2): Congress declared certain Internet providers "shall [not] be held liable on account of" either of two specified actions. §230(c)(2). As that provision and the rest of the Addendum make clear, Congress uses explicit language to create liability exceptions. Section 230(c)(1) plainly lacks such language.

Section 230(c)(1) is unusual. The construct "no...shall be treated as" appears just 68 times in the United States Code (38 instances in the Tax Code). Of those, just *one* expresses an intent to limit liability: 42 U.S.C. 7522(a) provides that certain actions "shall not be treated as *a prohibited act* under [another provision]." §7522(a) (emphasis added). An important distinction exists between §7522(a) and §230: The former expressly states that the subject act is not to be treated as a "prohibited act," while §230 states that certain Internet providers are not to be treated "as [a] publisher or speaker," with neither term defined and nothing making "publisher" or "speaker" status grounds for liability. Rather, §230(c)(1), unlike §7522, does *not* reflect intent to limit liability. It simply bars application of rules applicable to publishers and

speakers. Any liability limitations effected are incidental to the statute's actual objective, enabling Internet providers to *remove* objectionable content. (Opening 18-20). That is why §230(c) is titled "Protection for 'Good Samaritan' Blocking and Screening of Offensive Material." *See Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (articulating two alternative interpretations of §230(c)(1) given this title and the statute's otherwise curious language (plaintiffs have advanced the second of these interpretations)); *Chicago Lawyers' Comm. v. Craigslist*, 519 F.3d 666, 669-70 (7th Cir. 2008) ("Subsection (c)(1) does not mention 'immunity' or any synonym.").

Facebook does not explain the odd language of §230(c)(1). Instead, it hides behind *dicta* from *Zeran v. AOL*, 129 F.3d 327, 330-31 (4th Cir. 1997).[1] *Zeran*, *not* an extraterritoriality case, articulates two objectives behind §230. First, without support beyond the same cherry-picked sentences Facebook relies on, *Zeran* says §230 was enacted "in part" to protect Internet speech. *Zeran*, 129 F.3d at 330-31. *Zeran* was wrong. It provided no evidence for this statement, which it need not have reached to resolve the defamation claim before it, and which it reached on thin

[1] Facebook also relies on *Jones v. Dirty World Ent.*, 755 F.3d 398 (6th Cir. 2014), repeating one quote out of context. (Response 30). Like *Zeran*, *Jones* was not an extraterritoriality case and its relevant section is only *dicta*. It identified *three* "main purposes" of §230, without selecting a favorite. *Jones*, 755 F.3d at 407-08. It derived those three main purposes from statements of prior courts (including *Zeran*), *id.*, offering no analysis of statutory text, legislative history, or any other original source.

analysis. It should not detain this Court. Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1255-56, 1260-63, 1274-75 (2006). *Zeran* continues: "Another important purpose of §230 was to encourage service providers to self-regulate the dissemination of offensive material over their services." *Id.* at 331. But all available evidence—the statutory text, the CDA as a whole, and the legislative history—shows that the latter was the *only* motivating objective behind §230. *See Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1163 n.12 (9th Cir. 2008) (*en banc*).

4. Even accepting all else that Facebook says, its conclusion is wrong. A statute mainly effecting liability limitations will nonetheless have some other "focus" for extraterritoriality purposes. Plaintiffs explained why, identifying seven distinct reasons in their opening brief. (Opening 32-34). Facebook responds feebly, citing only *Blazevska v. Raytheon Aircraft*, 522 F.3d 948, 954 (9th Cir. 2008), for the proposition that extraterritoriality has no application since this case "involves a purely domestic application of a U.S. law to a U.S. company in a U.S. court." (Response 29). *First*, *Blazevska* did not say that. It held that contacts pertinent to a statute of repose, governing procedural rules only, are only those related to the filing of the claim in a U.S. court. *Blazevska*, 522 F.3d at 953. It expressly applies only to similar statutes regulating procedural rules. *Id.* The CDA, having considerable substantive content and policy objectives, is not such a statute. *Second*, this Court

has expressly rejected *Blazevska*, saying it "carries little (in any) clout." *Loginovskaya v. Batratchenko*, 764 F.3d 266, 272-73 & n.5 (2d Cir. 2014) (holding *Morrison* and *Kiobel* contradict *Blazevska*). *Third*, *RJR Nabisco* and *WesternGeco*, more recent precedent, are irreconcilable with *Blazevska*.

5. Facebook asserts that three opinions—none of which binds this Court—prove the CDA applies despite the presumption against extraterritoriality. (Response 29). But two of these do not even consider the presumption and are not precedent. *Webster v. Fall*, 266 U.S. 507, 511 (1925).

Facebook's one opinion that addresses extraterritoriality, *Gonzalez v. Google*, 282 F.Supp.3d 1150, 1161-63 (N.D. Cal. 2017), is a district court opinion, now on appeal, which relied mainly on the district court opinion in this case.

B. Section 230 Has Been Raised Prematurely

Plaintiffs argue that because §230(c)(1) provides an affirmative defense, it may not be reached on a motion to dismiss unless "the statute's barrier to suit is evident from the face of the complaint." (Opening 35-36) (quoting *Ricci v. Teamsters Union*, 781 F.3d 25. 28 (2d Cir. 2015) (*per curiam*)). Facebook appears to agree. (Response 12-13). The parties differ only on the second step: Whether the complaint inevitably establishes §230(c) applicability. (Opening 35-37; Response 12-13). Facebook must show that even accepting all the complaint's allegations as true and drawing all reasonable inferences in favor of the plaintiffs, the complaint

makes §230(c)'s application inevitable. It has not even tried to meet that burden below (Opening 35) or here.

Arguing a different point, Facebook briefly discusses specific allegations of the complaint, asserting they establish that plaintiffs seek to hold it liable as a "publisher or speaker." (Response 17-18). But Facebook merely quotes isolated allegations that Hamas authored terrorist content and used Facebook to facilitate its terrorism. (Response 18). Plaintiffs do not assert Facebook's liability for Hamas-authored content in the way a defamation plaintiff asserts a publisher's liability as if it were the speaker. Plaintiffs assert Facebook's liability for its provision of services to Hamas, not mere publication. (29-32, 117-24); (Opening 50-52). Plainly, the complaint does *not* facially establish that "the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.'" *FTC v. LeadClick Media*, 838 F.3d 158, 175 (2d Cir. 2016).

Facebook does not discuss specific complaint allegations elsewhere in its brief. Rather than attempt to satisfy its burden, Facebook relies on seven district court opinions, just two within this Circuit (one unpublished), for the proposition that "numerous other courts" resolved "this case on the pleadings." (Response 12). Yet it did not show that different complaints in its other cases resemble this one. Facebook's burden was to show that *this complaint* renders application of §230(c) inevitable. It did not.

C. Section 230 Does Not Apply When Foreign Substantive Law Does

Plaintiffs argue that Israeli substantive law applies to their claims stated under Israeli law. (Opening 57-62). Facebook apparently agrees. It argues only that §230(c)(1) should bar those claims, even though Israeli substantive law applies, because "[t]he CDA[,] on its face[,] applies to foreign-law claims." (Response 38).

Choice of law questions arise when jurisdictions with competing contacts and interests have different governing law. When a choice of substantive law arises, that choice is resolved using the forum state's choice of law rules. The prevailing forum's substantive law applies *in full*. *Day & Zimmermann v. Challoner*, 423 U.S. 3, 4-5 (1975); *Lauritzen v. Larsen*, 345 U.S. 571, 591 (1953) (Jackson, *J.*); (Opening 61-62). If the forum does not prevail in the choice of law analysis, only its procedural law applies. *See Kilberg v. N.E. Airlines*, 9 N.Y.2d 34, 41-42 (1961).

When Israeli substantive law governs, §230(c)(1), a substantive federal statute, does not apply. Under Israeli law, §230(c)(1) has no counterpart and Facebook is liable. Asking this Court to apply §230(c)(1) despite acknowledging the applicability of Israeli law, Facebook effectively asks this Court to disregard New York's choice of law rules and the Supreme Court's directive in *Day & Zimmermann*.

If the Israeli law claims were being tried in Israeli court, §230(c)(1) would certainly not be entertained. The same result should obtain in an American court applying Israeli substantive law.

II. The Complaint Supports Plaintiffs' Claims

A. Facebook Forfeited Objection to the Israeli Law Claims

Plaintiffs' complaint includes three claims asserted under Israeli law. (129-35). Facebook's motion to dismiss failed to request dismissal of those claims. (DE 35). It asserted that §230(c)(1) requires dismissal of the Israeli law claims in the related *Cohen* case (DE 35 at 18-20) but made no similar argument as for the claims in this case. Plaintiffs nevertheless defended their Israeli law claims before the district court (DE 40 at 31-33) and again before this Court. (Opening 58-59). Facebook responds with a single conclusory footnote, unsupported by authority or legal argument. (Response 40 n.7). Facebook thus forfeited the issue. *City of New York v. Mickalis Pawn Shop*, 645 F.3d 114, 137 (2d Cir. 2011). If this Court determines that the CDA does not bar this action, the Israeli law claims must stand.

B. Plaintiffs Adequately Alleged Proximate Causation

1. To plead an ATA claim, plaintiffs must allege facts suggesting "the defendant's actions were 'a substantial factor in the sequence of responsible causation, and that the injury was 'reasonably foreseeable or anticipated as a natural consequence.'" (Opening 40) (citations omitted). Facebook agrees (Response 41-

42), but nonetheless argues the issue as though a higher standard applies, demanding a showing that "any of Facebook's actions 'led directly' to the terrorist attacks." (Response 42). No "lead directly" test exists.

Facebook extracted its "lead directly" test from a parenthetical quote in *Rothstein v. UBS*: "[W]ith respect to 'proximate causation, the central question...is whether the alleged violation *led directly* to the plaintiff's injuries[.]'" 708 F.3d 82, 91-92 (2d Cir. 2013) (ellipses in original, emphasis added). Not another word in *Rothstein* considers the "led directly" language. *Rothstein* used it to support an earlier block quote articulating the governing test, quoted in the prior paragraph. *Id.* at 91. *Rothstein* could not be clearer: The defendant's acts must be a substantial factor in causing reasonably foreseeable or anticipated injuries, but they need not *directly* cause those injuries. *Id.*

Plaintiffs meet this standard. (Opening 41). Facebook protests that the complaint fails to allege that Facebook was a substantial factor in any of the particular terror attacks. (Response 42). Actually, 72 pages are devoted to just that. (41-112). Another 13 pages elaborate on Facebook's culpability. (112-24).[2]

[2] Facebook invokes *Fields v. Twitter*, 881 F.3d 739 (9th Cir. 2018). (Response 43-44). *Fields* involves a complaint that "establishes [only] that Twitter's alleged provision of material support to ISIS facilitated the organization's growth and ability to plan and execute terrorist acts." *Fields*, 881 F.3d at 749-50. It bears no relation with the complaint here.

2. Facebook apparently realizes all this; it changes the subject in the next line of its brief: Facebook objects that plaintiffs did not allege that "Facebook was a participant in the terrorist attacks." (Response 42) (internal quotation marks omitted). Elsewhere, Facebook goes a step further, suggesting plaintiffs needed to allege that Facebook "had advance knowledge of the [identities] of the perpetrators or the specific terrorist attacks at issue." (Response 48). But Facebook does not need to kill people or even know in advance about any particular terror attack to be liable under the ATA. Its material support of terrorism, defined in 18 U.S.C. §§2339A, 2339B(a) & (g)(4), suffices. Plaintiffs' pleading obligations as for proximate causation are only to allege or support the reasonable inference that Facebook's material support of Hamas was a substantial factor in plaintiffs' foreseeable injuries. The 84 pages of the complaint mentioned above plainly do so.

3. Facebook provided Hamas valuable services despite knowing exactly with whom it was dealing (as plaintiffs explain in subpart C, *infra*) and what the likely consequences would be. Proximate causation requires nothing more. Otherwise, victims of terrorism, who typically do not know their attackers and have limited information, would be incapable of successfully pleading an ATA case—obviously not what Congress intended.

C. Plaintiffs Adequately Alleged Actual and Constructive Knowledge

1. Facebook asserts the complaint lacks "a single allegation that Facebook knew of and failed to take action against an account used by HAMAS itself." (Response 45 & 48). That is false, as plaintiffs show momentarily. But even if it were true, it would not matter. *First*, material support under 18 U.S.C. 2339A turns on support of terrorists, not their sponsoring organization. Thus, knowledge of "an account used by Hamas itself" is irrelevant. *Second*, Facebook violated 18 U.S.C. 2339B (prohibiting support of designated foreign terrorist organizations) by permitting a known Hamas operative to use a Facebook account to facilitate Hamas' activities. That constitutes providing services to Hamas, even if Hamas has no property interest in the Facebook account. (*See* 33 (¶118) ("These...affiliates are so identified with and controlled by HAMAS that one who provides material support or resources to any of them is...[supporting] HAMAS.")). It would mock Congress' work to assume its efforts to defund terrorism turn on corporate formalities. Hamas is a terrorist organization, not a bank or a social media company. That it might operate informally is unsurprising. *See Holder*, 561 U.S. at 30 ("Terrorist organizations do not maintain organizational firewalls....") (emphasis and internal quotation marks omitted).

2. Regardless, the complaint alleges Hamas operated accounts in its own name and Facebook had actual knowledge of that fact. It specifically identifies five

Hamas subsidiaries or divisions that had their own Facebook pages, each using the "Hamas" name. (35-36). Additionally, the Izz al-Din al-Qassam Brigades, widely regarded as Hamas' military[3] and considered by the federal government to be synonymous with Hamas,[4] had a Facebook page. (36). Al-Aqsa TV, widely known as "the official Hamas-run television channel"[5] and so regarded by the government,[6] likewise had a Facebook page. (35). The complaint also alleges five official Hamas spokesmen have maintained individual Facebook accounts used to promote Hamas and its terrorist activities. (34). Finally, the complaint alleges that several "specially designated global terrorists" ("SDGT") (*see* 26 (¶¶74-75)) who were senior members of Hamas had Facebook accounts. (33-34).

The complaint likewise alleges that Facebook has long been obligated to monitor certain transactions to ensure compliance with anti-money laundering and counterterrorism regulations. (113, 339-40). Among its obligations is the on-going duty to monitor OFAC's list of SDGT and other designated terrorists to ensure that none of the people with names or aliases on OFAC's list use Facebook's services.

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[3] Wikipedia, Izz ad-Din al-Qassam Brigades, https://en.wikipedia.org/wiki/Izz_ad-Din_al-Qassam_Brigades.

[4] OFAC, Sanctions List Search, Hamas, https://sanctionssearch.ofac.treas.gov/Details.aspx?id=208.

[5] Wikipedia, Al-Aqsa TV, https://en.wikipedia.org/wiki/Al-Aqsa_TV.

[6] OFAC, Sanctions List Search, Al-Aqsa TV, https://sanctionssearch.ofac.treas.gov/Details.aspx?id=2427.

Id. OFAC's list is digitized and publicly available: U.S. Dep't Treasury, Specially Designated Nationals and Blocked Persons List (SDN) Human Readable Lists, https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx.[7] Data-formatted lists to facilitate automated real-time compliance checks and searches are available. *Id.* OFAC's sanctions lists can also be easily queried: OFAC, Sanctions List Search, https://sanctionssearch.ofac.treas.gov. (Enter "Hamas" in the "Name" field (leave the remaining fields blank) to see OFAC's listing for Hamas.)

Facebook is no stranger to OFAC's sanctions regime and its lists of designated nationals. Facebook knows how to run checks of its clientele to ensure compliance with federal sanctions. Thus, as the complaint alleges, "[t]here is no reason...Facebook could not have used these same lists to ensure...it does not provide [its services] to designated terrorists....." (113). Nor is there any reason to believe that Facebook had no idea that, for example, Facebook user Mousa Abu Marzook is an SDGT who has close affiliations with Hamas. (34). That is public information, available on OFAC's website.[8]

[7] A consolidated list of *all* organizations and individuals sanctioned by OFAC is available: U.S. Dep't Treasury, Consolidated Sanctions List Data Files, https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx.

[8] OFAC, Sanctions List Search, Abu Marzook, https://sanctionssearch.ofac.treas.gov/Details.aspx?id=77.

Plaintiffs also allege Facebook was specifically warned several times that it was supporting Hamas and other terrorists. (113-17). For example, Facebook's CEO and General Counsel received a letter from plaintiffs' Israeli counsel in September 2013 warning that its support of Hamas was unlawful and grounds for civil liability. (113). In February 2015, the Chairman of the House Subcommittee on Terrorism, Nonproliferation, and Trade wrote an article for CNN accusing "American...social media companies" of violating "Section 219 of the Immigration and Nationality Act" for "provid[ing] a designated foreign terrorist organization with 'material support or resources.'" (116). And in October 2015, Israeli Prime Minister Benjamin Netanyahu publicly identified Facebook as the cause of many "murderous attacks." (116-17).

Facebook had *actual* knowledge, at all relevant times, that it was actively and directly supporting Hamas and its senior operatives, violating U.S. sanctions and federal criminal law (18 U.S.C. §§2339A, 2339B), and that its support of Hamas caused many people to die. (This knowledge is reflected, *inter alia*, in Facebook VP Andrew Bosworth's internal memorandum acknowledging that Facebook's work might cause people to "die[] in a terrorist attack," but arguing Facebook was nonetheless doing "de facto good." (Opening 12-13)). At very least, it had constructive knowledge, which is sufficient under the ATA.

3. Facebook declares it "routinely removes terrorist content." (Response 45 & 49-50). Simultaneously, Facebook declares a right to allow Hamas to use its platform and complains that the ATA, by directing otherwise, compels Facebook "change...the nature of the platform" against its will. (Response 20). Facebook cannot have it both ways.

Plaintiffs expect to persuade the jury at trial that Facebook's anti-terrorism policies were never meant to be followed; Facebook uses them as subterfuge, hiding behind them to avoid congressional scrutiny (340-41) and judicial scrutiny. Had Facebook actually honored its policies, plaintiffs' decedents would likely still be alive.

D. Plaintiffs Adequately Alleged Facebook's Secondary Liability

Facebook acknowledges that *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), delineates the "legal framework" that governs secondary liability claims under the ATA. *See Linde v. Arab Bank*, 882 F.3d 314 (2d Cir. 2018). But, even so, it pays only lip service to *Halberstam*. Plaintiffs' treatment of *Halberstam* and secondary liability under JASTA in their opening brief was concise because they find their assertion of secondary liability against Facebook so uncontroversial, they expected little resistance from Facebook. Facebook devoted over five pages of its brief to the issue and got nearly every point wrong. (Response 46-51). Thus, fuller discussion is necessary. First, a review of *Halberstam*:

Linda Hamilton was the "passive but compliant partner" to a burglar named Welch. 705 F.2d at 474. Hamilton did not participate in the burglaries—and may not have even known that burglaries were happening—but she knew "that something illegal was afoot," and she helped convert stolen property and accounted for the resulting cash. *Id*. at 486-87. After Welch killed one of his victims during a burglary, the victim's family and estate successfully sued Hamilton on theories of aiding and abetting and conspiracy.

After surveying case law governing aiding and abetting and civil conspiracy, the D.C. Circuit affirmed Hamilton's liability. *Halberstam*, 705 F.2d at 479-86. *Halberstam* found Hamilton liable even though nothing suggested that her back-office activities caused the murder, that she was aware of the murder, or that she was aware of the *burglaries*. Regarding aiding and abetting, *Halberstam* held it sufficed "that she knew [Welch] was involved in some type of personal property crime at night," "because violence and killing is a foreseeable risk in any of these enterprises." *Id.* at 488. Regarding conspiracy, *Halberstam* held "a conspirator can be liable even if he neither planned nor knew about the particular overt act that caused injury, so long as the purpose of the act was to advance the overall object of the conspiracy." *Id*. at 487.

With these holdings in mind, we consider the elements of aiding and abetting and conspiracy.

1. *Aiding and Abetting*

To properly plead aiding and abetting, the complaint must support plausible inference that "(1) the party the defendant aid[ed]...perform[ed] a wrongful act that cause[d] an injury; (2) the defendant [was] generally aware of his role" in the "overall illegal or tortious activity"; and "(3) the defendant...knowingly and substantially assist[ed] the principal violation." *Id.* at 487-88. "[Any] person who assists in a tortious act may be liable for other reasonably foreseeable acts done in connection with it," even if the secondary actor lacked knowledge of the other connected acts. *Id.* at 484. Thus, noted *Halberstam*, a thirteen-year-old boy could properly be held secondarily liable for a church fire arising during a break-in by boys seeking soft drinks, despite having nothing to do with the fire. *Id.* at 482-84 (citing *Am. Fam. Mut. v. Grim*, 440 P.2d 621 (Kan. 1968)).

The first element is easily met here and is not disputed: Hamas wrongfully killed and injured the plaintiffs and their loved ones in several terror attacks. The second element requires allegations suggesting only that Facebook was "generally aware" of its role in some tortious activity, not that it knew of any specific activity or even the nature or extent of the damages. *Halberstam*, after all, found Hamilton "generally aware" of her role in Welch's criminal activities despite not being specifically aware of any of them. *See id.* at 488. Plaintiffs have adequately pleaded

facts sufficient to support the plausible inference that Facebook was generally aware of its role in facilitating Hamas' terrorism. (*See*, *e.g.*, 33-36, 112-17, 122-24).

The third element, knowing substantial assistance, is necessarily less straight-forward because it involves balancing various factors, each with "many variables," in a "calculus" that courts must use to determine if the assistance provided was adequately substantial. *Halberstam*, 705 F.2d at 483, 488. *Halberstam* articulates six factors—no one of which is dispositive and the weight of each in the calculus is undefined. *Id.* at 478, 483-84, 488 & n.13. Notably, the contributing activity need not be "nefarious," it merely needs to be substantial. *Id.* at 482.

The first factor, the "nature of the act encouraged" is most significant here. *Halberstam* explains that the type and extent of support necessary will vary depending on what the primary tortfeasor did. *Id.* at 484 & n.13. Less support might be sufficient if, as here, it causes the victims to suffer more severe injuries. Similarly, less support is sufficient as for "particularly bad or opprobrious acts." *Id.* In other words, "a defendant's responsibility for the same amount of assistance increases with the blameworthiness of the tortious act or the seriousness of the foreseeable consequences." *Id.* The act here, terrorism, is "particularly bad."

The second factor, "the amount [and kind] of assistance," looks not to the dollar value of the support rendered but to the support's significance in "prompting the tort." Support "integral" to the wrongful act is more likely to be found adequately

"substantial." *Id.* at 484, 488. Hamas's operations and attacks at issue were theoretically possible without Facebook, but they would have been far less likely. The "Facebook intifada" (86[9]) owes its breadth to Facebook.

Facebook was admittedly not present at any of the attacks, just as Hamilton was not present at Welch's murder. But, like Hamilton, "[Facebook]'s role in [the business] was substantial." *Id.* at 488. Thus, Facebook's absence from the murders does not cut against its liability.

The fourth factor, Facebook's relation to Hamas and its terrorists, likewise supports Facebook's liability. Facebook profited from its arrangement with Hamas. (Opening 6-14, 46-47). By agitating people, Hamas generates interesting and controversial Facebook posts that get others to use Facebook more. That is particularly true when the frenzy itself is created on Facebook.

The fifth (Facebook's "state of mind") and sixth ("duration of assistance") factors likewise balance in favor of liability. Facebook knew or was indifferent to the fact it was engaged in the material support of Hamas for years and was *expressly*

[9] *See also* Micah Lakin Avni, Opinion, *The Facebook Intifada*, N.Y. Times, Nov. 3, 2015, https://www.nytimes.com/2015/11/03/opinion/the-facebook-intifada.html ("I realized that the world leaders who were having the most impact on the situation in the Middle East right now weren't Mr. Ban or Prime Minister Benjamin Netanyahu, but Mark Zuckerberg of Facebook...."). The author, a son of Richard Lakin, is one of the plaintiffs.

indifferent (in the Bosworth memo and internal reaction thereto (Opening 12-13)) and certainly knew that its support of Hamas was causing people to die.

Finally, given the strong federal policy against terrorism and it supporters, continuously re-affirmed by Congress (Congress again *unanimously* amended the ATA on October 3, 2018, strengthening it further[10]), extending to terror victims "the broadest possible basis" for civil recovery even against indirect supporters of terrorism (Justice Against Sponsors of Terrorist Act, 18 U.S.C. 2333, note ("JASTA")), this Court should recognize that the scales that weigh "substantial assistance" must be properly calibrated to fairly address terrorism in the digital age. *Halberstam* made clear that law governing secondary liability is still being developed and must not be viewed as "immutable" but will "be adapted as new cases test [its] usefulness in evaluating vicarious liability." *Halberstam*, 705 F.2d at 489. *Halberstam* thus had no problem modifying the definition of "substantial assistance" (adding a sixth factor to the Restatement's list of five). *Id.* at 478, 484. This Court should follow suit. Old modes adequate when actors interacted face-to-face are no longer adequate, at least in terrorism cases. One who knowingly gives significant support to a designated foreign terrorist organization should be liable as an abettor

[10] The Anti-Terrorism Clarification Act of 2018, Pub. L. 115-253, 132 Stat. 3183 ("ATCA"), cabins a certain defense against ATA claims, makes more assets available for judgment enforcement, and subjects more terrorists and terror supporters to the personal jurisdiction of federal courts.

of terrorism *per se*. *See Boim v. Holy Land Found.*, 549 F.3d 685, 698 (7th Cir. 2008) (*en banc*); *Holder*, 561 U.S. at 29-32; (117). "[V]iolence and killing," after all, "is a foreseeable risk" of any significant support of terrorism. *See Halberstam*, 705 F.2d at 488.

2. *Conspiracy*

Civil conspiracy demands no showing of substantial assistance. *Id.* at 478. Its elements are "[1] an agreement to do an unlawful act or a lawful act in an unlawful manner; [2] an overt act in furtherance of the agreement by someone participating in it; and [3] injury caused by the act." *Id.* at 487. *All* members of a conspiracy "are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy." A conspirator who knew nothing of a particular injurious act and enjoyed no direct benefit from that act is still liable, "so long as the purpose of the tortious action was to advance the overall object of the conspiracy." *Id.* at 481.

Plaintiffs' allege Hamas and Facebook tacitly reached an agreement, reflected by Facebook's knowing and repetitive tolerance of Hamas' public presence on Facebook (*see*, *e.g.*, 113-17, 121-24), to spread Hamas' message of violence against Israeli Jews online and facilitate Hamas' operations. (31, 126-27). Hamas obviously benefits—Facebook is a principal vehicle by which Hamas communicates with the public and its own operatives. (30-33, 37-41); (Opening 41). Facebook likewise benefits because Hamas' extreme rhetoric brings people, and thus advertising

revenue, to Facebook. (37-41, 124); (*see also* Opening 6-14, 46-47). That agreement is unlawful in that it directly violates 18 U.S.C. §§2339A, 2339B and indirectly involves the murder of innocent civilians.

The "overt act" required in the second element is the Hamas terror attacks here at issue; it is not disputed. *See Halberstam*, 705 F.2d at 477, 487.[11] Finally, Plaintiffs' injuries at Hamas' hands are obviously not in question.

The only legitimate issue separating the parties is whether Facebook and Hamas reached an agreement like the one described. But, as Facebook recognizes, plaintiffs must merely plausibly allege the existence of such an agreement. (*See* Response 50-51). Plaintiffs need not produce a contract between Hamas and Facebook specifying the nature of their agreement; they need not even assert the *existence* of a formal agreement. Rather, "a tacit, as opposed to explicit, understanding [between the parties] is sufficient to show agreement" for the purposes of civil conspiracy. *Id.* at 477, 487. The evidentiary threshold here is rather low. Even at trial, plaintiffs will need to produce only "indirect" or "circumstantial" evidence from which the jury will be able to "infer" the existence of a tacit agreement. *Id.* at 480, 486. Thus, at the pleading stage, they need only plausibly

[11] Plaintiffs asserted previously that the necessary "overt act" was Facebook's "permitting or re-establishing Hamas accounts." (Opening 43). That was an error. Facebook was not prejudiced by it—Facebook apparently did not even notice it.

allege circumstances suggesting Facebook and Hamas tacitly worked in tandem to achieve unlawful ends. They have certainly met that burden. (31-33, 37-41, 113-17, 121-24, 126-27).

III. The First Amendment Does Not Support Facebook

Proposed Amicus EFF suggests this Court should affirm on First Amendment grounds. Its arguments lack merit.

A. This Court Should Not Consider the Constitutionality of the ATA

EFF hardly makes any mention of the ATA in its proposed brief. Without analysis or discussion, EFF falsely asserts that plaintiffs' ATA claims would "hold Facebook liable for hosting user-generated content discussing or promoting for [*sic*] terrorism." (EFF 4). Relying on that erroneous assumption, EFF erroneously hypothesizes that plaintiffs' claims against Facebook presume Hamas' speech enjoys no constitutional protections. *Id.* It takes this a step further, asserting that the only relevant speech that could be deprived all constitutional protection is speech that incites violence. So it erroneously assumes that plaintiffs either seek to hold Facebook liable for constitutionally protected speech or for incitement. (EFF 6-8).

EFF has built a house of cards. In all its construction, it lost sight of (or sought to obfuscate) what it is really doing here: Its arguments assume that the ATA is unconstitutional. (*See* EFF 22).

While the ATA is certainly constitutional, as plaintiffs explain below, this Court should not reach the question. Neither the First Amendment nor the ATA's constitutionality was raised or reached below. Facebook has not asked this Court to address either. It should not. *First*, this is "a court of review, not one of first view." *Prabhudial v. Holder*, 780 F.3d 553, 555 (2d Cir. 2015) (citation omitted); *see also U.S. v. Mehanna*, 735 F.3d 32, 42 (1st Cir. 2013) ("[A]mici cannot ordinarily introduce into a case issues not briefed and argued[.]"). *Second*, EFF's arguments were either waived or forfeited by Facebook's failure to raise them below. *Mhany Mgt. v. County of Nassau*, 819 F.3d 581, 615 (2d Cir. 2016) (forfeiture); *Prabhudial v. Holder*, 780 F.3d 553, 555 (2d Cir. 2015) (waiver).

The better course is for the Court to decide this appeal as presented. If Facebook succeeds, that will likely be the end of the matter. If plaintiffs succeed and this case is remanded, the district court may determine whether to entertain the arguments made by EFF, if Facebook raises them.

B. Facebook is Not Engaged in Expression So No First Amendment Rights are Implicated

Facebook asserts it "had nothing to do with 'creat[ing]' or 'develop[ing]' the content found on any HAMAS-related page." (Response 21-22) (alterations in original). It must so assert because immunity under the CDA so requires. 47 U.S.C. 230(c)(1) & (f)(3); *Roommates.com*, 521 F.3d at 1167. Having disavowed its

relationship with that content, Facebook can assert no First Amendment right to communicate it. *See Rumsfeld v. FAIR*, 547 U.S. 47, 65-66 (2006).

EFF, though, asserts Facebook is entitled to First Amendment protection. EFF obviously assumes that Facebook is a communicator, engaged in some sort of expression. But Facebook itself has said otherwise. EFF's position must be disregarded; Facebook has no constitutionally protected interest.

C. The Rights of All "Internet Users" are Not Implicated

EFF asserts everyone has a "right to receive...information," which (purportedly) includes a right to have Facebook inform it of controversial matters, such as terrorism. (EFF at 3, 8-11). EFF is wrong: Even assuming that individuals have a constitutional right to receive information, that right does not extend to create a general right to compel *private* actors (such as Facebook) to divulge information.

Moreover, even if there were such a right to compel private actors to speak, it is not implicated here. Plaintiffs seek a holding that Facebook is liable under the ATA for its past knowing provision of material resources to Hamas. They seek no injunction about future information that might come into Facebook's possession. What Facebook might do in the future regarding this hypothetical new information is up to Facebook and its shareholders.

D. Hamas has No Protected Speech Rights

This lawsuit does not seek to silence Hamas. It merely vindicates the federal interest in prohibiting Facebook from giving Hamas a voice and facilitating its operations. Plaintiffs are aware of no applicable constitutional prohibition.

Even if so prohibiting Facebook raised constitutional questions, the supposed constitutional injury is suffered by Hamas, not Facebook. Hamas is not a litigant here. It is a federally designated terrorist organization that is an enemy of civility (19-25) and the United States (25-29) and has murdered and maimed many innocent people, including the plaintiffs and their relatives. (41-112). This Court should not do its bidding; if Hamas desires to assert its rights, it can come to court and do so.

Even if Hamas itself were before the Court, this Court should have no trouble rejecting the notion that its rights are being threatened. *First*, nearly all the posts complained of involve true threats or incitement to violence, which, as EFF admits, are not constitutionally protected. (EFF 2). *Second*, nothing in the record suggests that Hamas or any of its terrorists are U.S. nationals or residents entitled to constitutional speech protections.

E. The First Amendment Does Not Create a Right to Materially Support Terrorists or Terrorist Organizations

The essential question EFF raises has already been answered by the Supreme Court: It upheld 18 U.S.C. 2339B, one of the material support provisions here at

issue, against a constitutional speech challenge. *Holder*, 561 U.S. at 25-39. The Court specifically noted that §2339B criminalized as "material support" certain forms of speech. *Id.* at 26. It did so with great precision. "Congress and the Executive," the Court noted, "are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not." *Id.* at 35. Congress carefully crafted the provisions to limit as much as possible any deprivation of constitutional rights. The Court noted several examples, such as the fact that §2339B is limited to federally designated foreign terrorist organizations, which have the right to "seek judicial review of the designation." *Id.* Further, "Congress has...displayed a careful balancing of interests in creating limited exceptions to the ban on material support." *Id.* at 36. "Finally, and most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups." *Id.* In short, "the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations." *Id.* at 26.

Consider what one supporting Hamas' terrorism *may* do under the ATA: Such people "may say anything they wish on any topic," including on Facebook. *Id.* at 25-26. "They may speak and write freely about [Hamas], the Government[] of [Israel], human rights, and international law." *Id.* They may advocate as much as they desire

in support of Hamas. *Id.* at 31-32. Mere speech, if not in the form of expert advice or assistance with logistics, is likely not provision of material support.

While Congress did not generally prohibit speech about terrorism, it did prohibit speech knowingly made for or in coordination with terrorists. *Id.* at 26. *Holder* upheld that prohibition while acknowledging that it involved content-based restrictions on speech. Without prescribing any particular standard of review, the Court implicitly upheld those restrictions on strict scrutiny. *Id.* at 28 (noting that "the Government's interest in combating terrorism is an urgent objective of the highest order"); *id.* at 26, 35-36 (explaining that Congress' work was adequately narrowly tailored).

This case is far easier than *Holder*. It does not involve prohibitions of speech *about* terrorism. It involves prohibitions regarding speech *by* terrorists. The reproduction of any speech (regardless of content) by Hamas in the furtherance of its mission is prohibited under the ATA if that reproduction constitutes a "service" to, and thus "material support" of, Hamas. 18 U.S.C. §2339A(b). The content of any specific message is important here only for assessing proximate causation. But the underlying prohibition ("material support") applies regardless of content. *Holder*, which authorized even content-based restrictions on similar speech, forecloses EFF's arguments in this content-neutral context.

Here, Facebook's targeted reproduction of Hamas' messages, on its behalf, facilitates Hamas' internal and external communications in real time, ensuring its messages reach their intended targets almost immediately and at no cost. It is an exceptionally valuable "service," essential to Hamas' operations, and thus violates the ATA. The First Amendment does not dictate otherwise.

IV. The CDA Does Not Support Facebook

A. The CDA's Purpose is to Facilitate Removal of Offensive Content, Not to Protect Internet Speech

Plaintiffs demonstrated in their opening brief (Opening 17-21, 30-32) and above (regarding extraterritoriality) that the purpose of the CDA was to "Empower[]" (SPA69) families and providers of Internet services to make the Internet "Decen[t]." (SPA65). Much of Facebook's argument about the CDA turns on its erroneous assertions regarding the CDA's purpose, so plaintiffs incorporate that discussion again here.

The true meaning of §230 is also reflected in a closely related provision at 47 U.S.C. 231. There, Congress exempts from the prohibition in §231(a) 1) transmission and hosting of third-party content, 2) as long as the host engages no "selection or alteration" of the content, 3) unless that alteration is merely a "deletion...in a manner consistent with [§230(c)]." §231(b)(4). Two points are apparent from this provision. First, Congress understood mere "selection" of material to potentially deny an Internet service the protections of §230(c). Second,

Congress' primary objective in both provisions is manifestly to facilitate "deletion" of undesirable material.

B. Facebook is a "Developer" of Content

Plaintiffs explained why Facebook is a "developer" of content and thus an "information content provider," excluded from §230(c)(1)'s immunity. §230(c)(1) & (f)(3); (Opening 44-49). Facebook devotes many pages of its response to this argument, but says almost nothing responsive. (Response 21-25). Plaintiffs rest on their opening brief and reply to a few minor points:

- Although plaintiffs need not plead around affirmative defenses like §230(c)(1) (Opening 35-36), the complaint plausibly alleges many facts supporting the reasonable inference that Facebook is a developer of content. (29-41, 117-21).

- The CDA defines as an "information content provider" any party that *either* "creat[es]" *or* "develop[s]" content. §230(f)(3). The terms "create" and "develop," as used in the statute, cannot be synonymous or they would be redundant. *Accusearch*, 570 F.3d at 1198. But Facebook's arguments suggest that it reads "develop" to mean "create." (Response 21-23).

- Facebook is not a passive actor. It maintains an automated system that links Facebook users together based on Facebook's analysis of the content of their posts. That pairing or brokerage service provided by Facebook,

choosing the content a user sees, is creative conduct. It derives from information developed by Facebook and is informative and communicative to the user who experiences it.

- Designing a website to facilitate tortious or illegal activity, such as Facebook's routine violations of the ATA, is "development" of content for purposes of the CDA. *J.S. v. Village Voice*, 359 P.3d 714, 717-18 (Wash. 2015) (*en banc*).

- Facebook's deliberate efforts to bring Hamas terrorists together and generate traffic (and thus revenue) are not the "neutral tools" referenced in some decisions. To the contrary, "offensive postings were [Facebook's] *raison d'etre*." *Accusearch*, 570 F.3d at 1200; (Opening 46-47).

- In any event, the text of §230(c)(1) permits no "neutral tools" test. *Daniel v. Armslist*, 913 N.W.2d 211, 223-24 (Wis. App. 2018), *review granted*, 383 Wis.2d 627 (2018). This Court should reject it.

C. The ATA Does Not Impose Liability on Facebook for its Duties as "Publisher"

Section 230 provides an affirmative defense *only* if "the *duty* that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker'" so that finding liability "inherently require[s] the court to treat the [defendant] as the 'publisher or speaker'" of content provided by someone

else. *LeadClick*, 838 F.3d at 175-77 (emphasis added). Facebook completely ignores this clear directive, despite being made aware of it. (Opening 50). Instead, it begins its argument fast and loose, inventing its own rule: "Section 230 of the CDA [*sic*] bars any cause of action that seeks to hold an interactive-computer-service provider liable for failing to remove or screen content created by a third-party user of the service." (Response 11). Facebook attributes this false statement of law to this Court and several others. (Response 15) (citing *Ricci*, 781 F.3d at 27-28). But *Ricci* says that §230 operates only when liability "as a 'publisher or speaker'" is asserted. *Ricci*, 781 F.3d at 27. To plaintiffs' knowledge, no other appellate court has held differently. *See Doe v. Internet Brands*, 824 F.3d 846, 851-54 (9th Cir. 2016).

As explained above, the ATA attributes no Hamas content to Facebook. Nor does it prohibit Facebook from reproducing third-party material about terrorism. 18 U.S.C. §§2339A, 2339B criminally prohibit Facebook from providing any sort of "material support" to Hamas and its terrorists, including material support that involves reproducing Hamas' speech (whether that speech be about terrorism or cake). *See Holder*, 561 U.S. at 25-39. The ATA civilly prohibits the same, to the extent that Facebook's actions proximately caused plaintiffs injuries. 18 U.S.C. 2333(a). The ATA is not dependent on content and does not relate in any way to Facebook's "duty" as a publisher.

This point might be clarified by distinguishing the ATA claims from a typical defamation claim, such the one resolved in *Ricci*. The *Ricci* plaintiffs attributed defamatory content to an Internet service provider that reproduced the content but had no role in creating it. They sued because the greater reach of the defamatory content exacerbated the plaintiffs' libelous injury. 781 F.3d at 27. The *Ricci* plaintiffs would have had no basis to sue if the Internet service provider had merely reported the fact of the defamatory allegations while expressing no opinion, even if it did so at the behest of the authors of the defamatory content. And the *Ricci* plaintiffs did not sue (and had no basis to do so) for the Internet service provider's provision of valuable services to the authors of the content. They sued only because the Internet service provider allegedly violated its duties *as a publisher*, arguing that the publisher should be liable for the content itself.

The plaintiffs here, in contrast, do not attribute third-party content to Facebook. They assert liability for, among other things, giving Hamas a forum with which to communicate and for actively bringing Hamas' message to interested parties. Plaintiffs are completely uninterested in Facebook's duties as a publisher. Their federal claims concern only Facebook's duties under the ATA. Those duties do *not* include (or even contemplate) publication. Nor do they obligate Facebook to silence Hamas or otherwise protect the public from its wrath. Instead, the ATA obligates Facebook to avoid providing knowing material support to Hamas. If it does

so and injuries result, it is liable. That the injuries were caused, in part, by the content of Hamas' speech changes nothing. *See Village Voice*, 359 P.3d at 722-23 (Wiggins, *J.*, concurring).

The CDA is not a get-out-of-jail-free card for Internet providers. *Internet Brands*, 824 F.3d at 852-53. Nor does it create a "lawless no-man's-land on the Internet." *Roommates.com*, 521 F.3d at 1164. It announces no "Internet exception" to tort law, and certainly not to the ATA. Indeed, paraphrasing Facebook: There is nothing in law or logic that exempts Internet-based claims from the ATA's prohibition of the support of terrorism. (*See* Response 10).[12]

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[12] *Jane Doe No. 1 v. Backpage.com*, 817 F.3d 12 (1st Cir. 2016) appears to say that the CDA bars any suit seeking to compel an Internet provider to change its website in any way. *Id.* at 20-22. But it distinguishes *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009), on precisely that ground, holding *Barnes* consistent with the CDA *because* it required Yahoo! to alter its website pursuant to a non-publication tort. *Id.* at 22. If *Backpage.com* accords with *Barnes* (as it claims to), it is also consistent with plaintiffs' position here.

If *Backpage.com* reaches a contrary result, it is distinguishable for the familiar reason that it involved claims attributing third-party content (offers for underage prostitution) to the Internet publisher. The *Backpage.com* plaintiffs argued otherwise, but erred in their presentation. Their argument actually meant that Backpage.com was a "creat[or] or develop[er]" of content, not that it was not liable as a publisher. *See id.* at 20-22; (Opening 44-46). They had previously waived the "developer" argument and the First Circuit refused to consider it. *Id.* at 19 n.4.

In any event, *Backpage.com* is a lone outlier. It ignores the express language of §230(c)(1) and its legislative history. It was rejected by Congress. H.R.Rep. 115-572 at 4-6 (2018) (mistakenly referring to the "Second Circuit" rather than the First)

D. The CDA Does Not Authorize Internet Companies to Coordinate Military Efforts of Terrorist Organizations

Facebook argues that under the CDA, it can *never* be liable for damages arising from (or "but for") "user-generated content." (Response 18-20). Following that reasoning, a U.S.-based Internet service should be free to deliberately and openly assist Hamas coordinate its terrorism by prioritizing posts by Hamas commanders on the feed of every user who has shown some interest in Hamas, so long as it does not substantively alter the posts. Indeed, it could expressly reach such an arrangement through contract with Hamas and advertise the same on its website and still be immune from the ATA. (Plaintiffs previously made a similar argument. (Opening 56-57). Facebook's response reveals that it agrees.)

Nothing in the CDA suggests such a rule. And nothing could be further from the intent of Congress as expressed in the ATA, JASTA, and (just this month) the ATCA.

E. Alternatively, if the CDA and ATA conflict, the ATA Controls

The parties agree that the CDA and ATA can be read in harmony and thus *should* be. They disagree only on how to harmonize the statutes. If this Court disagrees and finds the CDA and ATA in conflict, the ATA must control.

(describing Backpage.com's acts as "far beyond publisher functions"); Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115-164, 132 Stat 1253 ("Trafficking Act"). This Court should similarly reject it.

Plaintiffs articulated four mutually exclusive reasons for that conclusion. (Opening 52-56). Facebook pretends to have seen just "three arguments." (Response 31). We start with the argument Facebook ignored:

1. Much that has been written about §230(c)(1) (including much dicta) has no relation with its text or legislative history. Plaintiffs argue this suggests that such statements are wrong and should not be followed. If this Court disagrees and uses those statements to put §230(c)(1) in conflict with the ATA, it must resolve that conflict by defaulting back to the CDA's pure statutory text. Common law expansions of §230(c)(1)'s reach, even if valid in other contexts, cannot trump the express statutory text of the ATA. (Opening 53-54). Facebook's attempt to bury this argument, misrepresenting plaintiffs' brief, should be taken as a concession.

2. Section 230(c)(1) does not apply to "impair the enforcement of...any...Federal criminal statute." §230(e)(1). The ATA is intended to enforce federal criminal statutes, such as 18 U.S.C. §§2339A, 2339B. *See Linde v. Arab Bank*, 706 F.3d 92, 112 (2d Cir. 2013) ("[T]he interests of the United States weigh heavily in this [ATA] case, even though it is a private lawsuit brought by individual victims of terrorism."). Thus, if §230(c)(1) would require dismissal of an ATA case, it would improperly impair the enforcement of the related criminal statutes. (Opening 52-53).

Facebook protests that the word "enforcement" references "only...criminal prosecutions." (Response 32). But statutes are interpreted according to their "plain and unambiguous meaning." *CSX Transportation v. Island Rail*, 879 F.3d 462, 470 (2d Cir. 2018). The plain and unambiguous meaning of the word "enforcement" is "[t]he act or process of compelling compliance with a law...." Black's Law Dictionary, *enforcement* (10th ed. 2014). Nothing in the phrase "enforcement of...any...Federal criminal statute" implies that this sort of "enforcement" is limited to criminal prosecutions.

To the contrary, the entire paragraph reveals that the word "enforcement" is meant to include civil litigation:

> Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

§230(e)(1). If "enforcement" meant only criminal prosecution, the specific statutory references (*e.g.*, "section 223") would be superfluous. It would have been enough to state that the CDA does not "impair the enforcement of any Federal criminal statute." Inclusion of specific examples makes sense only if "enforcement" is read more broadly and the specific examples are meant to include forms of *civil* litigation excluded from the CDA's reach. That was indeed Congress' intent in passing the Trafficking Act, the express purpose of which is to "*clarify* that section 230...does

not prohibit the *enforcement* of [certain] Federal and State criminal *and civil* law...." *Id.* (emphasis added). Its legislative history bemoans that §230 "has complicated enforcement" of anti-trafficking laws, noting "civil litigation" about Backpage.com as the prime example. H.R.Rep. 115-572 at 4.

Facebook claims to find support in *Backpage.com* (Response 32), which (Facebook omits) was abrogated by the Trafficking Act. H.R.Rep. 115-572 at 4-6. *Backpage.com* indeed finds the "plain-language reading" of the statutory text to "exclude[] civil suits." *Backpage.com*, 817 F.3d at 23. Beyond being dreadfully unpersuasive for the reasons explained above, it is also easily distinguishable. *Backpage.com* does not suggest that the plaintiffs there presented any evidence that the relevant civil provision was intended *by Congress* to aid in the enforcement of related criminal provisions (the Trafficking Act, which so indicates, was not yet written). Plaintiffs here have demonstrated Congress indeed intended the *Anti-Terrorism* Act to aid in the enforcement of the criminal counterterrorism laws it is associated with. (Opening 14-15, 53).

Facebook treats this evidence of congressional intent most curiously. It argues: Because Congress made no explicit reference to the CDA while discussing the ATA, the ATA cannot be deemed related to the enforcement of criminal law. (Response 33). But Congress was discussing the purpose of the ATA, not the CDA. Section 230(e)(1) went unmentioned because it was irrelevant.

3. If the Court rejects both of the above methods of resolving the conflict, it should default to later-enacted and more specific statute, the ATA. (Opening 54-56).

Facebook objects that the recent enactment of JASTA (and, presumably, the ATCA) somehow *proves* that Congress wants the ATA to yield to the CDA. (Response 35). This "response" is completely unresponsive. Facebook apparently concedes that the ATA is the later-enacted statute.

Facebook's argument here is on a different (unrelated) point. It believes JASTA shows congressional intent to allow the CDA to defeat ATA claims. Yet JASTA expressly extends to terror victims "the broadest possible basis" for civil recovery even against indirect supporters of terrorism. 18 U.S.C. 2333, note. If Congress intended an Internet exception, despite its exceptionally broad language, it surely would have said so. The fact that Congress did not expressly disclaim an Internet exception is unsurprising. To the best of plaintiffs' knowledge, when JASTA was passed in 2016, no court had *ever* found that the ATA must yield to the CDA, even as for claims unrelated to the terror supporter's duties as a publisher. Even when the ATCA was passed in 2018, after a few district courts had reached that holding, Congress remained uninterested and unconcerned; no appellate court has ever so held.

Facebook separately argues that the CDA is the more specific statute because "the CDA is intended to apply to a limited subset of defendants" while "[t]he ATA...applies in a much broader set of circumstances." (Response 37). But the CDA covers most Internet postings. Today, over 70% of small businesses have a website and nearly every American spends many hours a day on the Internet. "Intermediary platforms" such as Facebook "are often the primary way...the majority of people engage...online." (EFF 12, 18-19). The CDA is pervasive. *Id.* The ATA, in contrast, covers claims by terror victims who suffer personal injury or property damage and their "estates, survivors, or heirs." 18 U.S.C. 2333(a). It permits claims only against terrorists and their supporters. *See id.* While terrorism is far too common and its supporters far too numerous, the ATA's reach is infinitesimally smaller than the CDA's.

The ATA provides a limited claim for a limited set of facts. Section 230(c)(1) provides immunity over *any* claim that would treat an Internet provider as publisher or speaker (or, according to Facebook, *any claim at all*). Determining which statute is more specific is not difficult.

4. Finally, if the Court rejects even that approach, it will need to resolve the conflict by holding that the ATA implicitly repeals the CDA to the limited extent of the conflict. (Opening 56).

Facebook apparently agrees. (*See* Response 36-37). Its objection is only that the CDA is the more specific statute and thus implicitly repeals the ATA. As we have seen, the ATA is the more specific statute.

CONCLUSION

The opinion of the court below should be reversed, the SAC be accepted as filed, and this case should proceed to discovery.

Dated: Baltimore, Maryland
October 31, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(g), I hereby certify that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B), Circuit Rule 32.1(a)(4)(A), and this Court's Order of October 19, 2018 (Pooler, *J.*) because, excluding the portions of this brief exempted by FRAP 32(f), this brief contains 9,999 words. This word count was made by use of the word count feature of Microsoft Word, which is the word processor used to prepare this brief.

I further certify that this document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6).

Dated: Baltimore, Maryland
October 31, 2018

/s/ Meir Katz
Meir Katz
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2018, I filed the foregoing using the ECF system, which is expected to electronically serve all counsel of record.

/s/ Meir Katz
Meir Katz

ADDENDUM

Table of Civil Statutes in Titles 18 and 47 of the United States Code Reflecting Intent to Limit Liability[*]

#	Citation	Pertinent Excerpt
1	18 U.S.C. 203(a) & 203(b)	Whoever, *otherwise than as provided by law for the proper discharge of official duties*, directly or indirectly [does prohibited conduct] shall be subject to...penalties.... (18 U.S.C. 216(b) describes applicable civil liability.)
2	18 U.S.C. 203(d) & 203(e)	*Nothing in this section prevents* [an employee] ... from acting, with or without compensation, as agent or attorney.... (18 U.S.C. 216(b) describes applicable civil liability.)
3	18 U.S.C. 203(f)	*Nothing in this section prevents* an individual from giving testimony under oath or from making statements required to be made under penalty of perjury. (18 U.S.C. 216(b) describes applicable civil liability.)
4	18 U.S.C. 205(a)	Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, *other than in the proper discharge of his official duties* [does prohibited conduct] shall be subject to...penalties.... (18 U.S.C. 216(b) describes applicable civil liability.)

[*] Plaintiffs identified the statutes populating this table by initially searching for the terms "immune," "immunity," "exempt," "liable," "liability," and "cause of action." They reviewed all statutes reflecting one of those terms to determine whether the statute is civil or criminal and whether it reflects an intent to limit liability.

Plaintiffs' counsel thanks law students Yael Klausner and Amit Liran for their extremely helpful research assistance. Without their help, compiling this Addendum would have been impossible.

#	Citation	Pertinent Excerpt
5	18 U.S.C. 205(b)	Whoever, being an officer or employee of the District of Columbia or an officer or employee of the Office of the United States Attorney for the District of Columbia, *otherwise than in the proper discharge of official duties* [does prohibited conduct] shall be subject to...penalties.... (18 U.S.C. 216(b) describes applicable civil liability.)
6	18 U.S.C. 205(d), 205(e), & 205(f)	*Nothing in subsection (a) or (b) prevents* [a governmental agent] ... from acting ... as agent or attorney.... (18 U.S.C. 216(b) describes applicable civil liability.)
7	18 U.S.C. 205(g)	*Nothing in this section prevents* an officer or employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt. (18 U.S.C. 216(b) describes applicable civil liability.)
8	18 U.S.C. 205(i)	*Nothing in this section prevents* an employee from acting pursuant to [specified statutes]. (18 U.S.C. 216(b) describes applicable civil liability.)
9	18 U.S.C. 207(j)(1)	*The restrictions contained in this section shall not apply* to acts done in carrying out official duties on behalf of the United States or the District of Columbia or as an elected official of a State or local government. (18 U.S.C. 216(b) describes applicable civil liability.)
10	18 U.S.C. 207(j)(2)	*The restrictions contained in subsections (c), (d), and (e) shall not apply* to acts done in carrying out official duties as [a governmental] employee.... (18 U.S.C. 216(b) describes applicable civil liability.)

#	Citation	Pertinent Excerpt
11	18 U.S.C. 207(j)(3)	*The restrictions contained in this section shall not apply* to an appearance or communication on behalf of, or advice or aid to, an international organization in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interests of the United States. (18 U.S.C. 216(b) describes applicable civil liability.)
12	18 U.S.C. 207(j)(4)	*The restrictions contained in subsections (c), (d), and (e) shall not prevent* an individual from making or providing a statement, which is based on the individual's own special knowledge in the particular area that is the subject of the statement, if no compensation is thereby received. (18 U.S.C. 216(b) describes applicable civil liability.)
13	18 U.S.C. 207(j)(5)	*The restrictions contained in subsections (a), (c), and (d) shall not apply* with respect to the making of communications solely for the purpose of furnishing scientific or technological information.... (18 U.S.C. 216(b) describes applicable civil liability.)
14	18 U.S.C. 207(j)(6)	*Nothing in this section shall prevent* an individual from giving testimony under oath, or from making statements required to be made under penalty of perjury. (18 U.S.C. 216(b) describes applicable civil liability.)
15	18 U.S.C. 207(j)(7)	Except as provided in subparagraph (B), *the restrictions contained in subsections (c), (d), and (e) shall not apply* to a communication or appearance made solely on behalf of a candidate in his or her capacity as a candidate.... (18 U.S.C. 216(b) describes applicable civil liability.)

#	Citation	Pertinent Excerpt
16	18 U.S.C. 208(b)	*Subsection (a) shall not apply* [in specified instances]. (18 U.S.C. 216(b) describes applicable civil liability.)
17	18 U.S.C. 209(c)	*This section does not apply* to a special Government employee or to an officer or employee of the Government serving without compensation.... (18 U.S.C. 216(b) describes applicable civil liability.)
18	18 U.S.C. 209(d), 209(e), 209(f), 209(g)(1), & 209(h)	*This section does not prohibit....* (18 U.S.C. 216(b) describes applicable civil liability.)
19	18 U.S.C. 229(b)	Subsection (a) *does not apply* to the retention, ownership, possession, transfer, or receipt of a chemical weapon by a department, agency, or other entity of the United States, *or by a person described in paragraph (2)*, pending destruction of the weapon. (18 U.S.C. 229A describes applicable civil liability.)
20	18 U.S.C. 248(a)	Whoever [does specified activities] shall be subject to...the civil remedies provided in subsection (c), *except that a parent or legal guardian of a minor shall not be subject to any ... civil remedies* under this section for such activities insofar as they are directed exclusively at that minor.
21	18 U.S.C. 922(s)(7)	A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection *shall not be liable in an action at law for damages* for [preventing or failing to prevent the] sale or transfer [of] a handgun.

#	Citation	Pertinent Excerpt
22	18 U.S.C. 922(z)(2)	*Paragraph (1)* [prohibiting certain transfers of handguns] *shall not apply to* [specified transfers]. (18 U.S.C. 924(p)(1)(A)(ii) describes applicable civil liability.)
23	18 U.S.C. 922(z)(3)(A)	*Notwithstanding any other provision of law*, a person who has lawful possession and control of a handgun, and who uses a secure gun storage or safety device with the handgun, *shall be entitled to immunity from a qualified civil liability action*.
24	18 U.S.C. 981(e)(7)	The United States *shall not be liable* in any action arising out of the seizure, detention, and transfer of seized property to State or local officials. The United States *shall not be liable* in any action arising out of a transfer under paragraph (3), (4), or (5) of this subsection.
25	18 U.S.C. 983(d)(1)	An innocent owner's interest in property *shall not be forfeited under any civil forfeiture statute*.
26	18 U.S.C. 1033(e)(2)	A person described in paragraph (1)(A) *may engage in the business of insurance or participate in such business if* such person has the written consent of any insurance regulatory official authorized to regulate the insurer, which consent specifically refers to this subsection. (18 U.S.C. 1034(a) describes applicable civil liability.)
27	18 U.S.C. 1169	Any person making a report described in subsection (a) which is based upon their reasonable belief and which is made in good faith *shall be immune from civil or criminal liability* for making that report.
28	18 U.S.C. 1531(a)	*This subsection does not apply* to a partial-birth abortion that is necessary to save the life of a mother.... (18 U.S.C. 1531(c) describes applicable civil liability.)

#	Citation	Pertinent Excerpt
29	18 U.S.C. 1833(b)(1)	An individual *shall not be held criminally or civilly liable* under any Federal or State trade secret law for the disclosure of a trade secret that....
30	18 U.S.C. 1833(b)(2)	An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law *may disclose* the trade secret to the attorney of the individual and use the trade secret information in the court proceeding....
31	18 U.S.C. 1962(a)	A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, *shall not be unlawful* under this subsection if.... (18 U.S.C. 1964(c) describes applicable civil liability.)
32	18 U.S.C. 2252(c), 2252A(c), & 2252A(d)	*It shall be an affirmative defense* to a charge of violating [a specified provision] that.... (18 U.S.C. 2252A(f) & 2255(a) describe applicable civil liability.)
33	18 U.S.C. 2258B(a)	Except as provided in subsection (b), *a civil claim* or criminal charge against an electronic communication service provider, a remote computing service provider, or domain name registrar ... *may not be brought in any Federal or State court*.
34	18 U.S.C. 2258D(a)	Except as provided in subsections (b) and (c), *a civil claim* or criminal charge against the National Center for Missing and Exploited Children...*may not be brought in any Federal or State court*.

#	Citation	Pertinent Excerpt
35	18 U.S.C. 2319B(d)	With reasonable cause, the owner or lessee of a motion picture exhibition facility...may detain...any person suspected of a violation of this section...and *shall not be held liable in any civil or criminal action* arising out of a detention....
36	18 U.S.C. 2336(a)	*No action shall be maintained* under section 2333 of this title for injury or loss by reason of an act of war. (18 U.S.C. 2333(a) & (d) describe applicable civil liability.)
37	18 U.S.C. 2337	*No action shall be maintained* under section 2333 of this title against the United States [or an agent or officer of the United States] or a foreign state [or an agent or officer of any foreign state]. (18 U.S.C. 2333(a) & (d) describe applicable civil liability.)
38	18 U.S.C. 2421A(e)	*It shall be an affirmative defense* to a charge of violating subsection (a), or subsection (b)(1) where the defendant proves, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted. (18 U.S.C. 2421A(c) describes applicable civil liability.)
39	18 U.S.C. 2511(2)(a)(ii)(B) & 2703(e)	*No cause of action shall lie in any court* against any provider of wire or electronic communication service, ... for providing information, facilities, or assistance in accordance with the terms of a court order, ... statutory authorization, or certification under this chapter.

#	Citation	Pertinent Excerpt
40	18 U.S.C. 2520(d)	A good faith reliance on [specified justifications] *is a complete defense against any civil or criminal action brought under this chapter or any other law*.
41	18 U.S.C. 2701(c) & 2707(e)	*Subsection (a) of this section does not apply* with respect to conduct authorized [by specified people or statutes]. (18 U.S.C. 2707(a)-(c) & (e) describe applicable civil liability.)
42	18 U.S.C. 2710(c)(4)	*No liability shall result* from lawful disclosure permitted by this section.
43	18 U.S.C. 2721(b)	Personal information referred to in subsection (a) ... *may be disclosed* as follows: .... (18 U.S.C. 2724 describes applicable civil liability.)
44	18 U.S.C. 3486(d)	*Notwithstanding any Federal, State, or local law*, any person, ... receiving a subpoena under this section, who complies in good faith with the subpoena and thus produces the materials sought, *shall not be liable in any court of any State or the United States* to any customer or other person for such production or for nondisclosure of that production to the customer.
45	18 U.S.C. 3509(h)(3)	A guardian ad litem shall be presumed to be acting in good faith and *shall be immune from civil and criminal liability* for complying with the guardian's lawful duties described in paragraph (2).
46	18 U.S.C. 4042(c)(5)	The United States and its agencies, officers, and employees *shall be immune from liability* based on good faith conduct in carrying out this subsection and subsection (b).

#	Citation	Pertinent Excerpt
47	47 U.S.C. 152	*The provisions of this chapter ... shall not apply* to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. (47 U.S.C. 206 describes applicable civil liability.)
48	47 U.S.C. 208(a)	If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, *the common carrier shall be relieved of liability to the complainant* only for the particular violation of law thus complained of.
49	47 U.S.C. 210(a) & (b)	*Nothing in this chapter or in any other provision of law shall be construed to prohibit* common carriers from [doing specified acts].
50	47 U.S.C. 222(d)	*Nothing in this section prohibits* a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents [for specified reasons]. (47 U.S.C. 206 describes applicable civil liability.)
51	47 U.S.C. 223(c)(2)	Except as provided in paragraph (3), *no cause of action may be brought in any court or administrative agency* against any common carrier, or any of its affiliates, including their officers, directors, employees, agents, or authorized representatives on account of [specified acts].
52	47 U.S.C. 223(e)(1)	In addition to any other defenses available by law: *No person shall be held to have violated subsection (a) or (d) solely for* [specified acts].... (47 U.S.C. 206 describes applicable civil liability.)

#	Citation	Pertinent Excerpt
53	47 U.S.C. 223(e)(4)	In addition to any other defenses available by law: *No employer shall be held liable under this section* for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.
54	47 U.S.C. 223(f)(1) & 231(c)(2)	*No cause of action may be brought in any court or administrative agency* against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this []section or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.
55	47 U.S.C. 223(f)(2)	*No State or local government may impose any liability for commercial activities or actions* by commercial entities, nonprofit libraries, or institutions of higher education in connection with an activity or action described in subsection (a)(2) or (d) that is inconsistent with the treatment of those activities or actions under this section.... (47 U.S.C. 206 describes applicable civil liability.)
56	47 U.S.C. 227(b)(1)(C)(ii)	*... except that this clause shall not apply* in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005.... (47 U.S.C. 206 describes applicable civil liability.)

#	Citation	Pertinent Excerpt
57	47 U.S.C. 228(e)(2)	*No cause of action may be brought in any court or administrative agency* against any common carrier or any of its affiliates on account of any act of the carrier or affiliate to terminate any pay-per-call service in order to comply with the regulations prescribed under ... Federal law unless the complainant demonstrates that the carrier or affiliate did not act in good faith.
58	47 U.S.C. 230(c)(2)	*No provider or user of an interactive computer service shall be held liable* on account of [specified acts].
59	47 U.S.C. 230(e)(3)	*No cause of action may be brought and no liability may be imposed* under any State or local law that is inconsistent with this section.
60	47 U.S.C. 558	*Nothing in this subchapter shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws*, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements unless the program involves obscene material.
61	47 U.S.C. 606(a)	Any carrier complying with any such order or direction for preference or priority herein authorized *shall be exempt from any and all provisions in existing law imposing civil or criminal penalties, obligations, or liabilities upon carriers* by reason of giving preference or priority in compliance with such order or direction.

#	Citation	Pertinent Excerpt
62	47 U.S.C. 615a(a) & 615a(b)	A [specified business and its officers and agents] *shall have immunity or other protection from liability...of a scope and extent that is not less than the scope and extent of immunity or other protection from liability* [that a similar entity or person has]....
63	47 U.S.C. 615a(c)	... a PSAP, and its employees, vendors, agents, and authorizing government entity (if any) *shall have immunity or other protection from liability of a scope and extent that is not less than the scope and extent of immunity or other protection from liability* under applicable law accorded to such PSAP, employees, vendors, agents, and authorizing government entity, respectively....
64	47 U.S.C. 1201(e)(1)	Any commercial mobile service provider (including its officers, directors, employees, vendors, and agents) that transmits emergency alerts and meets its obligations under this chapter *shall not be liable to any subscriber to, or user of, such person's service or equipment* for [specified acts].
65	47 U.S.C. 1472(a)	A provider or user of Next Generation 9–1–1 services, a public safety answering point, and the officers, directors, employees, vendors, agents, and authorizing government entity (if any) of such provider, user, or public safety answering point, *shall have immunity and protection from liability under Federal and State law to the extent provided in subsection (b)* with respect to [specified matters].